

WORKING WITH ATTORNEYS AND OTHER REPRESENTATIVES DURING MEDIATION

JEROME JONES
ASSOCIATE CHIEF COUNSEL FOR
ALTERNATIVE DISPUTE RESOLUTION



**Federal Aviation
Administration**



Vision

- TO PROVIDE ADDITIONAL CONFLICT MANAGEMENT TOOLS FOR USE IN RESOLVING ACTUAL OR POTENTIAL DISPUTES INVOLVING OUR EMPLOYEES, MANAGERS AND OTHER STAKEHOLDERS



Vision Statement

- TO HELP OUR AGENCIES OPERATE IN A MORE EFFICIENT AND EFFECTIVE MANNER, BY ENCOURAGING, WHERE POSSIBLE, CONSENSUAL RESOLUTION OF DISPUTES AND ISSUES IN CONTROVERSY, INCLUDING THE PREVENTION AND AVOIDANCE OF DISPUTES



Objectives

- TO ENCOURAGE THE USE OF ALTERNATIVE DISPUTE RESOLUTION (ADR) WITHIN THE FEDERAL GOVERNMENT
- TO DEVELOP NEW ADR INITIATIVES
- TO ENSURE THAT OUR NEW AND EXISTING ADR PROGRAMS ARE OF THE HIGHEST QUALITY



Additional Objectives

- TO SUPPORT PROGRAMS THAT INCREASE THE COMMUNICATIONS SKILLS THAT ARE SO NECESSARY TO EFFECTIVE CONFLICT AVOIDANCE AND RESOLUTION



Conflict

- CONFLICT IS A PART OF LIFE.
- WE MAY BE ABLE TO PREVENT SOME CONFLICTS, BUT HOW WE MANAGE CONFLICT IS EQUALLY IMPORTANT.



Conflict

- **WE MUST NOT LET CONFLICT CONTROL US, OR INTERFERE WITH OUR MISSION OF SERVING THE AMERICAN PEOPLE.**
- **WHEN DISPUTES ARISE AS WE DO OUR JOBS AS PUBLIC SERVANTS, OUR FIRST RESPONSE SHOULD NOT BE TO FIGHT, BUT TO TRY TO SOLVE THE PROBLEMS THAT HAVE CREATED THE DISPUTES.**
- **WE HOLD THESE POSITIONS OF RESPONSIBILITY NOT TO FIGHT WITH OUR EMPLOYEES, OUR CONTRACTORS, OR THOSE WHOM WE REGULATE - BUT TO SERVE THE PEOPLE BY OPERATING THE PROGRAMS AND DELIVERING THE SERVICES THAT MUST BE PROVIDED.**



Conflict

WHEN WE PROMOTE PROBLEM SOLVING THROUGH DISPUTE RESOLUTION PROGRAMS, WE ARE EMPOWERING OUR GOVERNMENT AGENCIES AND THEIR OFFICIALS TO EXERCISE CREATIVE RESPONSIBILITY TO PREVENT CONFLICT, AND TO RESOLVE DISPUTES EARLY, BEFORE THEY OVERWHELM US.

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Conflict Management

- Unfortunate trend in our society to rely less on direct communication and more on adversarial methods like litigation to resolve disputes or advance interests.
- Lack of communication creates unnecessary misunderstandings.
- Consequences of conflict increase over time and conflicts become more difficult to resolve.



WHAT IS ADR?

- RANGE OF LARGELY
NON ADVERSARIAL PROBLEM SOLVING
PROCESSES USED FOR RESOLVING
CONFLICTS



GOAL OF TRADITIONAL MEDIATION PROCESS

- TO FACILITATE OPEN DISCUSSIONS BETWEEN THE DISPUTANTS AND ASSIST THEM IN REACHING A MUTUALLY AGREEABLE RESOLUTION



ROLE OF MEDIATOR

- YOUR ROLE IS TO CREATE OPPORTUNITIES FOR RESOLUTION TO OCCUR



ROLE OF MEDIATOR

- Serves as neutral facilitator.
- Builds trust
- Summarizes, restates, and prioritizes issues in a non-judgmental manner.
- Assists in the generation or clarification of options.
- Evaluates options and possible consequences.
- Enforces the ground rules.
- Identifies areas of mutual interest.



COMMUNICATION

- MEDIATION PROVIDES A UNIQUE OPPORTUNITY FOR THE PARTIES TO COMMUNICATE DIRECTLY WITH EACH OTHER
- THIS OPPORTUNITY IS NOT GENERALLY AVAILABLE IN OTHER FORUMS SUCH AS COURTS



DESIGNING SOLUTIONS

- IDEALLY, THE SOLUTION SHOULD BE THE PARTIES' SOLUTION
- TO BE EFFECTIVE IN THE LONGER TERM, RESOLUTIONS SHOULD ADDRESS THE UNDERLYING INTERESTS OF THE PARTIES



RIGHT TO REPRESENTATION

- PARTIES TO A MEDIATION HAVE THE RIGHT TO REPRESENTATION, THOUGH THEY MAY WAIVE THAT RIGHT
- THIS IS PARTICULARLY TRUE WHERE A MEDIATION INVOLVES EEO OR OTHER LEGAL RIGHTS AND ISSUES



ROLES OF PARTIES AND REPRESENTATIVES

- IDEALLY, THE MEDIATION PROCESS IS DESIGNED TO ALLOW THE PARTIES THEMSELVES TO DO THE TALKING *INITIALLY*, WITH REPRESENTATIVES PRIMARILY OBSERVING AND LISTENING



ROLES OF PARTIES AND REPRESENTATIVES

- LATER, PARTICULARLY IN CAUCUS SESSIONS, REPRESENTATIVES WILL HAVE AMPLE OPPORTUNITY TO PARTICIPATE



ROLES OF PARTIES AND REPRESENTATIVES

- SOME PARTIES MAY NOT FEEL COMFORTABLE SPEAKING FOR THEMSELVES, PARTICULARLY IN THE EARLY STAGES OF A MEDIATION OR WHERE THERE ARE ACTUAL OR PERCEIVED POWER IMBALANCES



FLEXIBILITY AND THE ROLE OF THE MEDIATOR

- MEDIATORS SHOULD BE SKILLED AND FLEXIBLE ENOUGH TO ACCOMMODATE THE DESIRES OF THE PARTIES, WHILE STILL EMPLOYING TECHNIQUES TO ENCOURAGE THEIR DIRECT PARTICIPATION



ENCOURAGING PARTICIPATION (by the parties directly)

- **DO YOU HAVE ANYTHING TO ADD?**
- **PERHAPS YOU CAN SHARE SOME ADDITIONAL INFORMATION THAT WILL FURTHER EXPLAIN THIS ISSUE.**
- **HOW DO YOU FEEL ABOUT ...?**
- **IS THAT YOUR UNDERSTANDING OF THE EVENTS/FACTS/ISSUES?**



HELPING PARTIES AND REPRESENTATIVES UNDERSTAND THE MEDIATION PROCESS

- OFTEN PARTIES AND THEIR REPRESENTATIVES DO NOT TRULY UNDERSTAND THE MEDIATION PROCESS
- THE MEDIATOR CAN ASSIST EVERYONE IN UNDERSTANDING THE PURPOSE OF MEDIATION AND ITS GROUND RULES



MEDIATION VERSUS LITIGATION

- MEDIATION IS NOT INTENDED AS A DISCOVERY PROCESS
- MEDIATION IS NOT AN ADVERSARIAL PROCESS



MEDIATION VERSUS LITIGATION

- *PARTIES DECIDE OUTCOME*
- IN MEDIATION THE PARTIES *VERSUS* A *THIRD PARTY* DECIDE THE OUTCOME OF THE PROCESS
- THEY MUST CONVINCE EACH OTHER TO ACCEPT A GIVEN SOLUTION, NOT A JUDGE



MEDIATION VERSUS LITIGATION

- *COMMUNICATION*
- **SINCE THE SOLUTIONS ARE THE PARTIES' SOLUTIONS, COMMUNICATION BETWEEN THEM IS IMPORTANT**
- **THEY MUST PRESENT MORE THAN JUST THEIR POSITIONS**
- **THEY MUST HELP THE OTHER SIDE TO ACCEPT THAT ANY AGREEMENT IS MUTUALLY BENEFICIAL**



MEDIATION VERSUS LITIGATION

- *COMMUNICATION*
- PARTIES AND REPRESENTATIVES OFTEN CONCENTRATE ON POSITIONS AND PERCEIVED RIGHTS VERSUS UNDERLYING ISSUES
- BOTH MAY BE IMPORTANT IN VARYING DEGREES



ROLE OF MEDIATOR

- THE MEDIATOR CAN HELP REPRESENTATIVES UNDERSTAND THAT DIRECT AND OPEN COMMUNICATION IS IN THEIR CLIENT'S BEST INTEREST



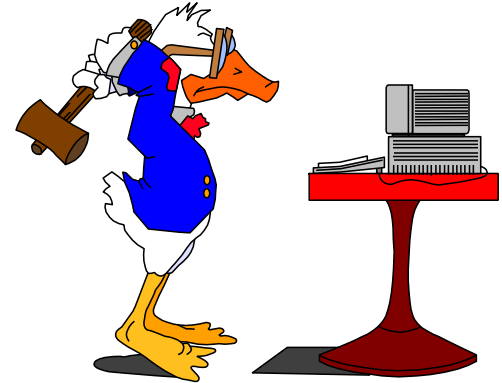
ENCOURAGING PARTICIPATION



- **WE APPRECIATE YOUR COMMENTS (REPRESENTATIVE), HOWEVER IT MIGHT ALSO BE HELPFUL TO HEAR YOUR CLIENT'S RECOLLECTION OF THESE EVENTS?**
- **IF MS. SMITH WOULD BE WILLING TO EXPLAIN HER FEELINGS ON THIS MATTER THAT MIGHT FACILITATE A BETTER UNDERSTANDING OF THIS ISSUE.**

MANAGING THE PROCESS

- **THIS MIGHT BE A GOOD TIME TO REMIND EVERYONE OF OUR GROUND RULES REGARDING MUTUAL RESPECT**
- **I WANT TO EMPHASIZE AGAIN THAT THIS IS NOT AN ADVERSARIAL PROCESS**
- **PERHAPS THAT IS SOMETHING THAT WOULD BE BETTER ADDRESSED IN CAUCUS**



MANAGING THE PROCESS

- **WE WANT TO GIVE EVERYONE A FAIR OPPORTUNITY TO CONTRIBUTE TO THE DISCUSSION**
- **I THINK THAT YOU'VE MADE YOUR POSITION CLEAR. IF I UNDERSTAND WHAT YOU ARE SAYING (paraphrase)... WOULD ANYONE ELSE LIKE TO COMMENT ON THIS?**



MEDIATION PROVIDES UNIQUE OPPORTUNITIES

- THE PARTIES CAN ALWAYS GO TO COURT OR ANOTHER ADVERSARIAL PROCESS
- THE OPPORTUNITY TO TRULY BE HEARD BY THE OTHER SIDE, TO LISTEN TO THEM, AND TO PARTICIPATE TOGETHER IN DEVELOPING SOLUTIONS IS UNIQUE



GAINING *BUY IN*

- IF THE REPRESENTATIVE UNDERSTANDS THE PROCESS WELL, THEY ARE MORE LIKELY TO SEE THE POTENTIAL ADVANTAGES OF *BUYING INTO* THE PROCESS



REPRESENTATIVE AS ADVERSARY

- AS AN ADVERSARY, A REPRESENTATIVE CAN UNDERMINE THE PROCESS BY:
- **BEING DISRUPTIVE**
- **CREATING AN ADVERSARIAL ATMOSPHERE**
- **DESTROYING TRUST**
- **ADVISING THE CLIENT AGAINST PARTICIPATION, COOPERATION, OR SETTLEMENT, ETC.**

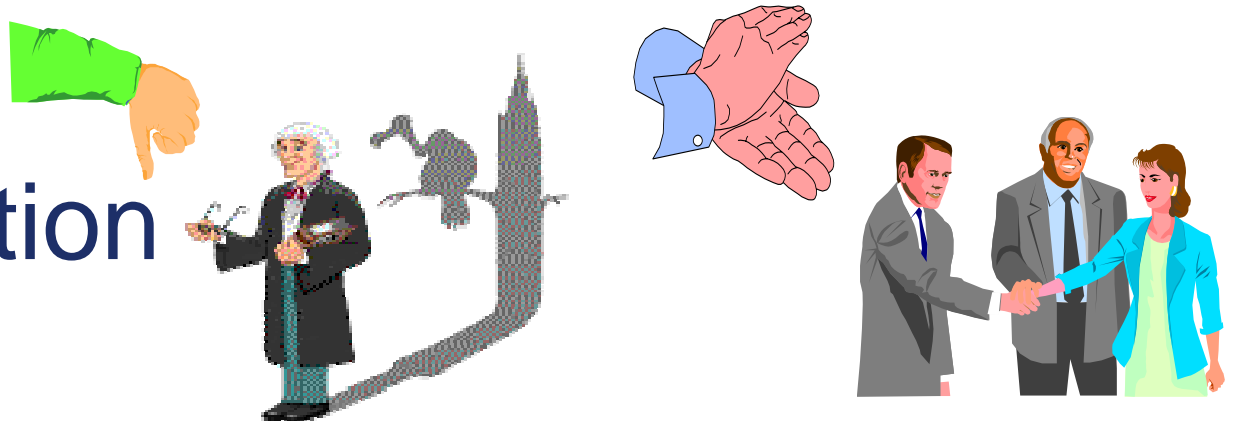


REPRESENTATIVE AS ALLY

- AS AN ALLY A REPRESENTATIVE CAN BE VALUABLE IN:
- **GAINING BUY IN FROM THEIR CLIENT**
- **BUILDING TRUST**
- **CONTROLLING A DISRUPTIVE CLIENT**
- **ASSISTING THE MEDIATOR AND THE OTHER PARTY IN UNDERSTANDING ISSUES**
- **REALITY TESTING**
- **DEVELOPING SOLUTIONS**

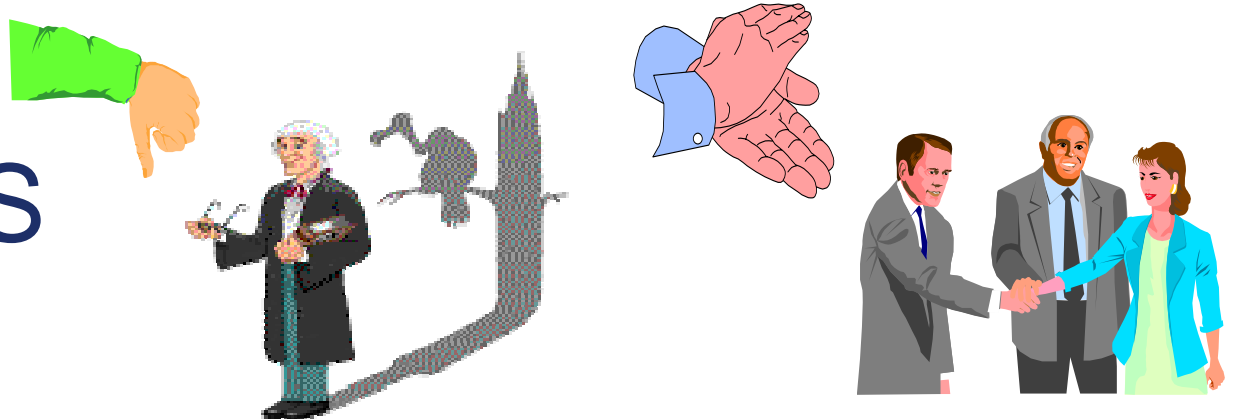


Recommendation



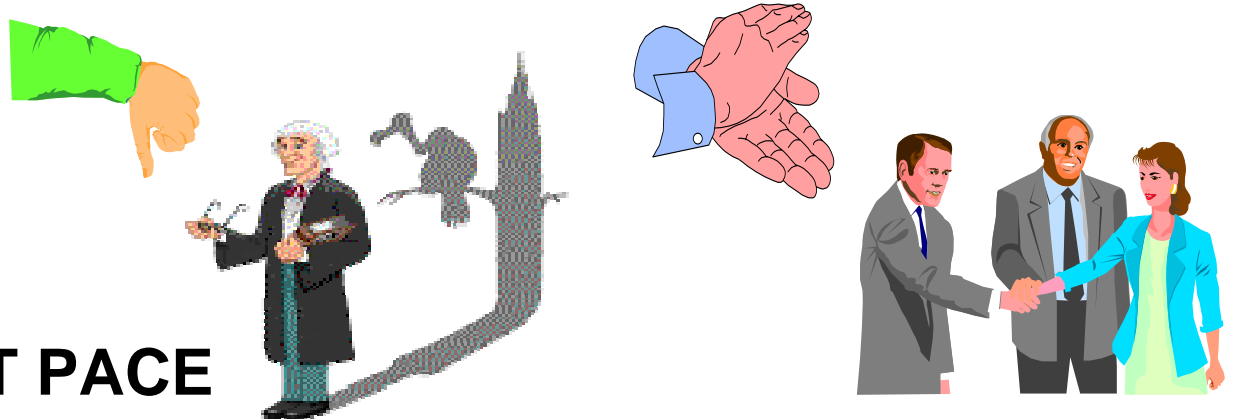
- **DON'T FEEL THREATENED BY THE PRESENCE OF A REPRESENTATIVE.**
- **WHERE POSSIBLE, MAKE THEM YOUR ALLY.**
- **HELP THE REPRESENTATIVE TO UNDERSTAND THAT CONTRIBUTING TO THE PROCESS, VERSUS DISRUPTING OR ATTEMPTING TO DOMINATE THE MEDIATION, IS IN EVERYONE'S BEST INTEREST**
- **MANAGE THE PROCESS WITHOUT ALIENATING THE REPRESENTATIVE OR THEIR CLIENT**

ADVOCATES



- **BE PREPARED**
- **ESTABLISH AND MAINTAIN CREDIBILITY AND TRUST**
- **BE FIRM BUT GENTLE - DON'T TRY TO INTIMIDATE**
- **LISTEN WITH FEW INTERRUPTIONS**
- **MAKE GOOD EYE CONTACT WITH EVERYONE**
- **KEEP ANY OPENING STATEMENT BRIEF AND CONSIDER INTERESTS NOT JUST POSITIONS**
- **INVITE CLIENT PARTICIPATION**
- **RECOGNIZE BENEFITS OF PRIVATE CAUCUSES**
 - **TEST IDEAS, CONFIDENTIAL, REALITY CHECKS WITH CLIENT**

ADVOCATES



- **LET MEDIATOR SET PACE**
- **EXPECT STRONG EMOTIONS**
- **UNDERSTAND NATURE AND LIMITS OF CONFIDENTIALITY**
- **LOOK FOR OPPORTUNITIES TO MAKE CONCESSIONS CONSISTENT WITH YOUR INTERESTS**
- **LISTEN TO MEDIATOR'S SUMMARIES AND FEEDBACK**
- **UNDERSTAND VALUE OF MEDIATOR AND MEDIATION PROCESS**